WAIVER IN INSURANCE CASES.

THERE are thousands of cases and hundreds of text-book pages explanatory and illustrative of the doctrine of waiver in its relation to insurance cases. What, then, is to be thought of the suggestion that this mass of learning proceeds upon a fundamentally erroneous principle; that election, and not waiver, is the doctrine really involved; that waiver is a sort of interloper, if not altogether an impostor; and that the substitution of election for waiver will produce a most substantial and valuable improvement in judicial methods and conclusions?

First, let us understand precisely what waiver is, or is said to be. It has been variously defined as follows:

"An intentional relinquishment of a known right." [1]

"The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the company has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the condition." [2]

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[1] Kent *v.* Warner, 1866, 94 Mass. 563; Stewart *v.* Crosby, 1863, 50 Me. 134; Shaw *v.* Spencer, 1868, 100 Mass. 395; West *v.* Platt, 1879, 127 Mass. 372; Boynton *v.* Braley, 1881, 54 Vt. 92; Dawson *v.* Shillock, 1882, 29 Minn. 191; Portland Ry. Co. *v.* Spillman, 1893, 32 Pac. Rep. 688 (Or.); Hecht *v.* Brandus, 1893, 4 N. Y. Misc. Rep. 58; Rice *v.* Fidelity, etc., 1900, 43 C. C. A. 270; 103 Fed. Rep. 427; Fairbanks, etc., *v.* Baskett, 1903, 71 S. W. Rep. 1116 (Mo.); 28 Am. & Eng. Ency. 526.

[2] Bigelow, Estoppel, 5th ed., 672. May, Ins. § 507. And see § 469 (c). The book has a chapter upon "Waiver and Estoppel," in which no attempt is made to distinguish between them (Cap. 23). *Per* Field, J., in Ins. Co. *v.* Wolff, 1887, 95 U. S. 333; Union, etc., *v.* Manhattan, etc., 1898; 26 So. Rep. 800 (La.); Grabbs *v.* Farmers, etc., 1899, 125 N. C. 389; 34 S. E. Rep. 503; Northern, etc., *v.* Grand View, etc., 1901, 183 U. S. 339; 22 Sup. Ct. Rep. 633; Société, etc., *v.* Moisan, 1898, 7 Quebec Q. B. 131. Cases too numerous for beneficial citation accept this view, or at all events refer to estoppel as identical with waiver. The following may be mentioned: Blake *v.* Exchange, 1858, 12 Gray (Mass.) 265; Hoxie *v.* Home, etc., 1864, 32 Conn. 40; Diehl *v.* Adams, etc., 1868, 58 Pa. St. 452; Elliott *v.* Lycoming, etc., 1870, 66 Pa. St. 22; Jewett *v.* Home, etc., 1870, 29 Ia. 562; Security, etc., *v.* Fay, 1871, 22 Mich. 467; Levin *v.* Phœnix, etc., 1876, 44 Conn. 91; Abbott *v.* Johnson, 1879, 47 Wis. 239; 2 N. W. Rep. 332; Northwestern, etc., *v.* American, 1887, 119 Ill. 329; Fairbanks, etc., *v.* Baskett, 1903, 71 S. W. Rep. 1113 (Mo.). The necessity for a change of position is implied in Rixley *v.* Ætna, etc., 1864, 30 N. Y. 136; Ins. Co. *v.* Wolff, 1877, 95 U. S. 330; Niagara

"Waiver need not be based upon any new agreement or an estoppel." [1]

"The principle upon which the waiver of a forfeiture has been maintair in such cases is undoubtedly similar to that of estoppel." [2]

"While a waiver of forfeiture need not be based upon a technical estoppel, yet in the absence of an express waiver some of the elements of an estoppel must exist." [3]

"A waiver to be operative must be supported by an agreement founded on a valuable consideration; or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition." [4]

"Waiver unsupported by consideration is not binding." [5]

"As to waiver, it is difficult to say precisely what is meant by the term with reference to the legal effect. A waiver is nothing unless it amounts to a release. It is by a release or something equivalent only, that an equitable demand can be given away. A mere waiver signifies nothing more than an expression of intention not to insist upon the right, which in equity will not, without consideration, bar the right any more than, at law, accord without satisfaction would be a plea." [6]

Ins. Co. *v.* Miller, 1888, 120 Pa. St. 517; Redmond *v.* Canadian, etc., 1891, 18 Ont. App. 342; Atlas, etc., *v.* Brownell, 1899, 29 S. C. Can. 537; Traders, etc, *v.* Cassell, 1900, 56 N. E. Rep. 259; Rice *v.* Fidelity, etc., 1900, 43 C. C. A. 270; 103 Fed. Rep. 427; Mobile, etc., *v.* Pruett, 74 Ala. 487.

[1] Titus *v.* Glen's Falls, etc., 1880, 81 N. Y. 419; Mee *v.* Bankers, etc., 1897, 69 Minn. 210; 72 N. W. Rep. 74; Gorson *v.* Anchor, etc., 1901, 113 Iowa 641; 85 N. W. Rep. 806; Modern, etc., *v.* Lane, 1901, 62 Neb. 89; 86 N. W. Rep. 944 (cases); Supreme, etc., *v.* Hall, 1901, 56 N. E. Rep. 783; Johnston *v.* Phelps, etc., 1901, 63 Neb. 21; 88 N. W. Rep. 142; Hartford *v.* Landfare, etc., 1902, 88 N. W. Rep. 779; Cassimus *v.* Scottish, etc., 1902, 33 So. Rep. 167 (Ala.); Hartford, etc., *v.* Landfare, 1902, 88 N. W. Rep. 779 (Neb.); Mee *v.* Bankers, etc., 1897, 69 Minn. 210; 72 N. W. Rep. 74.

[2] Hollis *v.* State, etc., 1884, 65 Iowa, 454; 21 N. W. Rep. 774. Approved in Home, etc., *v.* Kennedy, 1896, 47 Neb. 138, 66 N. W. Rep. 279; and see Billings *v.* German, etc., 1882, 34 Neb. 502; 52 N. W. Rep. 379; Wiedert *v.* State, etc., 1890, 19 Ore. 261; 24 Pac. Rep. 242; Frasier *v.* New Zealand, etc., 1901, 64 Pac. Rep. 816.

[3] Holt on Insurance 623; Armstrong *v.* Agricultural, etc., 1890, 130 N. Y. 565; 29 N. E. Rep. 991; Ronald *v.* Mutual, etc, 132 N. Y. 356; Gilson, etc., *v.* Liverpool, etc., 1899, 159 N. Y. 418; 54 N. E. Rep. 23; Meech *v.* National, etc., 1900, 50 N. Y. App. Div. 144; 63 N. Y. Sup. 1008; Germania, etc., *v.* Pitchen, 1902, 64 N. E. Rep. 922 (Ind.).

[4] Ripley *v.* Ætna, etc., 1864, 30 N. Y. 136; New York, etc., *v.* Watson, 1871, 23 Mich. 486; McFarland *v.* Peabody, etc., 1873, 6 W. Va. 430; Underwood *v.* Farmers, etc., 1874, 57 N. Y. 506; Merchants, etc., *v.* Lacroix, 1876, 45 Tex. 168; Northwestern *v.* Amerman, 1887, 119 Ill. 329; Texas, etc., *v.* Hutchins, 1880, 53 Tex. 68.

[5] 28 Am. & Eng. Ency. 531. And see Belknap *v.* Bender, 1878, 75 N. Y. 453; Lantz *v.* Vermont, 1891, 139 Pa. St. 546.

[6] Stackhouse *v.* Barnston, 1805, 10 Ves. 466. Waiver at law and in equity are the same thing. Commercial, etc., *v.* New Jersey, etc, 1901, 49 Atl. Rep. 157 (N. J.).

"The common expression 'waiving a forfeiture,' though sufficiently correct for most purposes, is not strictly accurate. When a lessee commits a breach of covenant on which the lessor has the right of re-entry, he may elect to avoid or not to avoid the lease. In strictness therefore the question in such cases is: Has the lessor, having notice of the breach, elected not to avoid the lease, or has he elected to avoid it, or has he made no election?" [1]

"Waiver is a voluntary act, and implies an election by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded or insisted on." [2]

Irrespective of the disagreement as to whether waiver must be based upon intention, there are six different views presented in these extracts, and for each of them plenty of authority can be cited:

1. Waiver is purely unilateral. That is to say, it is completed by the act of one only of the parties interested.

2. Waiver is bilateral. The acts, however, are not simultaneous, but in sequence. That is to say, upon the faith of the act of one party the other changes his position. This is estoppel.

3. Waiver is bilateral. It is not based upon estoppel; nevertheless it is undoubtedly similar to estoppel, and some of the elements of estoppel must exist.

4. Waiver is bilateral. The parties to it act at the same moment. That is to say, they make a contract.

5. Neither a new agreement nor the elements of estoppel are required.

6. The expression "waiving a forfeiture" is incorrect. Election is the applicable doctrine; and the act is unilateral.

Having this clear comprehension of waiver, and of its value as a solvent of difficult problems, let us follow it into the insurance cases and see how it operates there.

Policies are crowded with numerous fine-type conditions, breach of any one of which "renders this policy void." And when a loss takes place the company frequently pleads (1) the existence, and

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[1] Croft *v.* Lumley, 1858, 6 H. L. Cas. 705 (*per* Bramwell, B.). Approved in Clough *v.* London, etc., 1871, L. R. 7 Ex. 35, in a judgment which was really written by Blackburn, J., see Scarf *v.* Jardine, 1882, 7 App. Cas. 360.

[2] Warren *v.* Crane, 1883, 50 Mich. 300. It must be "an intentional act with knowledge," — Darnley *v.* London, etc., 1867, L. R. 2 H. L. 43. Approved in Holdsworth *v.* Tucker, 1887, 143 Mass. 374; Hoxie *v.* Home, etc., 1864, 32 Conn. 40; Montague *v.* Massey, 1882, 76 Va. 314; Findeisen *v.* Metropole, etc., 1885, 57 Vt. 524; see also Bennecke *v.* Ins. Co., 1881, 105 U. S. 359. But see Croft *v.* Lumley, 1858, 6 H. L. Cas. 720, *contra*.

(2) the breach, of one of these conditions. This is supposed to be a perfectly good plea, and the plaintiff replies, and tries to prove some waiver by the company of either the condition or the breach of it. If he fails to prove waiver he is beaten.

All the cases proceed in this way, and it is my contention that they are all wrong. Demonstration of this assertion, moreover, I conceive to be an extremely simple task.

Let it be granted, as assumed basis of argument, that the word "void" in the policy really means "voidable at the election of the insurance company." Almost everybody agrees upon that point. Citations are unnecessary.

Very well. Now suppose that you are defending an insurance company, that the policy declares that if a certain condition is broken "the policy shall be void at the election of the insurance company," and that you are instructed to plead a breach of the condition, what will you say? Will you content yourself with asserting (1) the condition, and (2) the breach? No; for the breach did not affect the policy in the slightest. It gave to the company a right to terminate the policy, if the company chose to do so. And if the company did not so choose, and until the company did so choose, the contract remained unaffected. That seems to be reasonably clear. You must plead, then, not merely (1) the condition, and (2) the breach, but you must add (3) that the company elected to cancel the policy. If you do not, your plea is bad; for it alleges merely the occurrence of circumstances which enabled the company to terminate the policy, but it leaves unasserted that the policy was terminated.

The company may do as it likes, subject to this: that being given a choice between two things it cannot take both. But as a matter of practice, aided by current notions of law, it does take both. For example, default is made in payment of a premium, and the company has consequently a right to terminate the contract. But that is the very last thing it wants to do and will do. On the contrary, it will dun and humor the chap, and take something on account and notes for the balance, and threaten and sue, and attach, and worry, in order to get the premium and keep the assured as a future subscriber. And if a loss happens meanwhile? Well, that of course is a different thing. The policy says that if the premium is not paid "this policy shall be void"; and the premium was not paid; and is not that a good defense? According to present ideas it is, unless you can prove waiver.

The language almost always used in the authorities is that by the breach the policy was "forfeited." Then it is assumed that being "forfeited" the policy is at an end. And thus the conclusion, that unless the forfeiture can be got rid of in some way (by waiver for example) the company need not pay the loss. We must examine this a little; for although what has already been said appears to me to be conclusive, I am nevertheless very well aware that mental prepossessions do not easily yield to argument.

"Forfeiture"! What do we mean by "forfeiture"? A lease provides that upon non-payment of rent the lease shall be void. The lease is an onerous one; the tenant refuses to pay his rent; then he claims that he has "forfeited" his lease, that it is at an end, and that he is free. Of course he is wrong about his freedom; and is he right in saying that he had "forfeited" his lease? Not a bit of it. He has done nothing but refuse to pay his rent; and if the landlord should (because of the default) elect to terminate the lease, he (the tenant) has not only not forfeited anything, but is to some extent advantaged. Forfeiture usually implies loss, and we speak of relief against forfeitures, and feel that they are a hard, oppressive sort of thing which ought to be displaced if possible. But the luck of our jubilant tenant makes no appeal to our sympathy, and we feel that the word "forfeiture" is somewhat misapplied in his case. If the lease were one of some value, and the landlord elected to cancel, we might in very untechnical language say that the tenant had "forfeited" his lease. But clearly the word would not describe a legal situation, for his default in this case is precisely the same as his default in the other case, and yet there we saw that even untechnically the word could not be used. Technically, he has made default; that is all. If this is really "forfeiture," and if (as is assumed) "forfeiture" means termination of the lease, then of course the lease is ended. But that is not the case. The lease is in exactly the same position as it was before default, and it will remain so, unless the landlord chooses to elect otherwise.

Distinguish a little with this word "forfeiture." No objection need be made to the expressions "by this act he forfeited his life," "by re-marriage she forfeited her annuity." In such cases the implication is that there is some law, or some testamentary or other proviso, by which loss of life or loss of annuity is a necessary consequence of the act. We do not mean that the act has given some other person a choice as to the continuation or deter-

mination of the life or annuity. We mean that the act itself has caused the loss, and not that the option of some other person may possibly impose it. But when an insured has failed to file his proofs we do not say that he has forfeited the policy, because forfeiture is not a necessary consequence of the act, which at the most exposes him to the possibility that at some future time the insurer will so elect as to terminate the policy. It is not terminated, observe, by the act of the insured, nor at the time of his act, but by the election of another person and at a future time (although with relation back).

"I have spoken of the right of re-entry of a landlord as a 'forfeiture' of the lease, but the use of the word 'forfeiture' in cases of this kind is somewhat misleading. This is not like a condition in a will, non-compliance with which causes a forfeiture. It is a contract between landlord and tenant that if the latter does, or omits to do, certain specific acts, then the landlord may re-enter."[1]

And if there is not, in landlord and tenant and insurance cases, any "forfeiture" by breach of condition (inserted for the benefit of the landlord or insurance company), there cannot of course be any "waiver of the forfeiture." For there is nothing to waive. Yet there is much authority to sustain such *dicta* as the following: —

"The doctrine of waiver seems applicable, properly speaking, only during the currency of the contract. . . . After a policy is forfeited I see not how it could be renewed or revivified except by an express agreement of the insurers."[2]

"After thirty days had expired without any statement, nothing but the express agreement of the company could renew or revivify the contract."[3]

If by breach of a condition a lease or a policy is "forfeited," and so terminated (whether the landlord or the tenant desired it or

[1] Barrow *v.* Isaacs, 1891, 1 Q. B. 417.

[2] Diehl *v.* Adams, etc., 1868, 58 Pa. St. 452; Carroll *v.* The Charter Oak Ins. Co., 38 Barb. (N. Y.) 402. And see Germania, etc., *v.* Klewer, 1889, 129 Ill. 599; Stephens *v.* Phœnix, etc., 1899, 85 Ill. App. 671; Home, etc., *v.* Kuhlman, 1899, 58 Neb. 493. In England "revivifying" a contract is spoken of as the *making of a new contract* after the old one has been "forfeited"; and a policy-holder failed in his action because an agent of the company had no authority to *make a bargain* binding the company to a new contract, on the terms of the old contract, but varying the time of payment: Acey *v.* Fernie, 1840, 7 M. & W. 150. Similarly in the law of landlord and tenant such language as "works a rehabilitation of the lease" is sometimes encountered: Dennison *v.* Maitland, 1891, 22 Ont. 172.

[3] Beatty *v.* Lycoming, etc., 1870, 66 Pa. St. 9; Neill *v.* Union, etc., 1882, 7 Ont. App. 175.

not), then of course the legal relations thus ruptured could not be renewed or revived except by new agreement. But, by the breach, nothing has happened to these relations, and there is no necessity for renewal or revivification. There has been no "forfeiture," and there is therefore nothing to waive.

Perhaps as strong a case as could very well happen, involving the view of forfeiture and the necessity for revivification, went to the British Privy Council.[1] A marine policy provided that the ship should not be in the Gulf of St. Lawrence after November 15; it was wrecked in that gulf in December; the owners abandoned; and the insurers accepted abandonment and dealt with the ship.

"It was contended that the vessel was not insured at the time when she was lost, as the insurance did not extend to a loss in the Gulf of St. Lawrence after the 15th of November, and that an abandonment can be of no avail when there is no insurance. But the vessel was in fact insured; the loss occurred during the time and upon a voyage described in the policy; but there was a breach of one of the warranties or conditions expressed."

Observe that if it be argued that "after a policy is forfeited" it cannot be renewed or revivified except by an express agreement of the insurers, the answer (in the case in hand) is that the policy never was forfeited; for the company, having a right to cancel it, elected not to do so. The judgment, however, does not proceed upon that principle. Very unsatisfactorily it declares that

"The effect of acceptance is . . . well expressed by Boulay Paty: '*Par leur acceptation volontaire il s'est fait un pacte entre les parties qui a tout terminé.*'"

In such cases, then, we cannot speak of "waiver of a forfeiture." Nor is it right to say that the insurer waives the condition or the breach of the condition. He has power to determine the contract or to continue it; and he exercises that power as he thinks best. And observe that his election to continue the contract, so far from being a waiver of the breach of the condition, has no effect whatever upon it. If a landlord elects not to re-enter because of non-repair according to contract, he does not "waive" the breach of contract; upon the contrary, he may sue upon it.[2] In no sense does he waive either the contract or its breach, for at the

[1] Provincial, etc., *v.* Leduc, 1874, L. R. 6 P. C. 224; 19 L. C. Jur. 281.

[2] Hartshorne *v.* Watson, 1838, 4 Bing. N. C. 178; Morecraft *v.* Meux, 1825, 4 B. & C. 606; Pellatt *v.* Boosey, 1862, 31 L. J. C. P. 283, *per* Erle, C. J.

same time that he elects not to re-enter because of the breach, he sues for damages. And as there has been no waiver of any "forfeiture" (for there was no forfeiture), so there has been no waiver at all.

It is not right even to say that the landlord or insurer waived his *right* to forfeit; for he did not. He had the right to choose between terminating the contract and continuing it; and he *exercised* that right of choice; he did not waive it, or give it up. If he had elected to determine the contract, no one would think of affirming that, by so doing, he had waived his right to continue it. And it is not more correct, when the election is to continue the contract, to say that he waived his right to determine it. If you have a choice between an apple and an orange, and you choose the orange, it would be rather absurd to say, either that you waived the apple, or your right to the apple (for you had none), or even your right to choose the apple (for you exercised your right by not choosing it).

One more suggestion. Rather than drop the word "waiver" altogether from these classes of cases, may we not say that there is waiver when the election is not to take advantage of the default? But waiver of what? Not of any forfeiture, because there is none. Not of the default, for it may still be sued upon. And not of the right to elect, for that has been exercised. And if "there is waiver," somebody must have waived. But in reality nothing has happened, and nothing has been done, except an election. If you choose to say that election to continue the contract is waiver of your right to determine it, say also that election to determine the contract is a waiver of your right to continue it. Then try it on the fruit, and explain that election in one direction means waiver in another. When you go to town you waive your right to stay at home.[1]

I object to the substitution of waiver for election, for it fixes attention, not upon the act that it pretends to describe, but upon a mere consequence of that act. Election is the choice of the orange, and the consequence is that you do not get the apple. But there is no abandonment, or cession, or surrender, or waiver, of the apple, for you never had it, or any right to it. You had a right to choose; you exercised that right; you gave up, or threw

[1] The following language is common enough: "The doctrine of election of remedies applies, that, one having been chosen, all others are deemed waived." Pratt *v.* Freeman, 1902, 115 Wis. 648; 92 N. W. Rep. 368.

away, or waived nothing. The point of the act is the choice, and attention ought to be drawn to the thing chosen, and not exclusively fixed upon the effect of that choice.

The following language, too, is objectionable in the interest of clearness of conception of the true situation:

"The material inquiry is whether the defendant elected to exercise, or to waive, his right to take advantage of the forfeiture." [1]

The existence of a right to elect is here acknowledged, but the underlying idea is that there has been a "forfeiture," and that if the forfeiture is not waived, it remains. Election does not determine what is to be done with a "forfeiture" situation, but whether there is to be any situation other than that which always existed. If "waiver" (in the connection in hand) be strictly limited to denote non-selection, and "waived" to mean "not selected," I shall withdraw objection to them, save upon the ground that having clumsy and forced meanings they will be sure to mislead us.

Some of the implications of the change here proposed are not only very striking, but will, it is hoped, be of great assistance to the courts in their struggle with some of the insurance companies. In the first place, silence strategy will no longer be available or beneficial to the companies. At present some courts say that breach of a condition is a forfeiture of the policy, and that a waiver of such forfeiture

"cannot be inferred from mere silence. It [the company] is not obliged to do or say anything to make a forfeiture effectual.[2] It may wait until claim is made under the policy, and then in denial thereof, or in defense of a suit commenced therefor, allege a forfeiture." [3]

And these courts are, at all events, consistent in this holding. If we assume that breach of a condition has "forfeited," in the sense of terminated, the policy, there can be no reason why the company should send notification of any sort to the insured. He knows of

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[1] Home *v.* Kuhlman, 1899, 58 Neb. 488.

[2] What does that mean?

[3] Titus *v.* Glen's Falls, etc., 1880, 81 N. Y. 419. Approved in Carson *v.* Home, etc., 1881, 53 Wis. 585; 11 N. W. Rep. 11. And see Phoenix, etc., *v.* Stevenson, 1879, 8 Ins. L. J. 922; Schrimp *v.* Cedar Rapids, etc., 1882, 124 Ill. 354; Smith *v.* St. Paul, etc., 1882, 3 Dak. 80; Queen, etc., *v.* Young, 1888, 86 Ala. 424; 28 So. Rep. 116; Armstrong *v.* Agricultural, etc., 1892, 130 N. Y. 565; 29 N. E. Rep. 991; Petit *v.* German, etc., 1898, 98 Fed. Rep. 800; Banholzer *v.* New York, etc., 1898, 74 Minn. 387; Parker *v.* Bankers, etc., 1899, 86 Ill. App. 315; Manhattan, etc., *v.* Savage, 1901, 23 Ky. 483; 63 S. W. Rep. 278.

the breach as well as the company (and usually better), and he knows that his contract is at an end. Then why tell him anything? Other courts are less consistent, but more nearly correct, when they declare that

"If the company contemplated the forfeiture of the policy because of the non-payment of the premium, it should at once have so declared, plainly and unconditionally."[1]

For such language assumes that the breach has no effect upon the policy, and that its termination is the result of the company's election. That being so, the necessity for a declaration by the company is obvious. If the breach ended the policy, then, as we have said, the company could have nothing to communicate to the assured, for he knew of the breach and of its legal effect. But if it is the election of the company that is the important factor, then the company has something to communicate, something of great importance to the assured, something of which he can have no knowledge unless it is communicated to him by the company. The first effect, then, of the proposed change is that silence strategy will be as obsolete as flint muskets, and that the law last quoted will be upheld rather than that which supports the contrary view. If the company wants to cancel the policy it must do so. It cannot have a live policy for premium catching and a dead one for loss dodging.

A second effect is that a very difficult onus of proof is taken from the assured and placed where it ought to be. At present the company proves (1) the existence of the condition, and (2) its breach; and then the assured tries to prove waiver. Most of the courts, with true instinct, help him all they can, and find and infer waiver upon most scanty evidence, or even surmise. But very frequently the reply fails, for it is

"the duty of the plaintiff to establish the parol waiver by a clear preponderance of evidence."[2]

For the future waiver has not to be proved, for it is not a factor in the case, and there is no allegation of it in the pleadings. Observe that the company's plea now is (1) condition, (2) breach, and (3) election to cancel. To such a plea waiver is inapplicable, and

[1] United States *v.* Lesser, 1900, 126 Ala. 568; 28 So. Rep. 646; Pollock *v.* German, etc., 1901, 86 N. W. Rep. 1017 (Mich.).

[2] McFarland *v.* Kittaning, etc., 1890, 134 Pa. St. 590; Gibson *v.* Liverpool, etc., 1902, 159 N. Y. 419.

the reply is a mere joinder of issue. The onus, therefore, instead of being on the plaintiff to prove waiver, is on the company to prove election. And the company must prove election with all its legal requisites as to time, communication, etc. Any conduct of the company which formerly the plaintiff would have shown in support of his waiver contention, he now gives (in rebuttal) in traverse of the company's alleged election to cancel the policy.

This is a very important point; for it may be very confidently asserted that companies would have found themselves unable to prove election to terminate in one case out of a hundred of those which they have defended. What they will do in the future may be surmised, but their current practice, at all events, will not help them to prove election. They are at present much more successful in criticising evidence of waiver than they would be in proving that they did what we all know they never do, save in extreme cases.

A third effect of the proposed change, and one of hardly less value than those already noted, has reference to the authority of agents of the company. At present the assured has to prove, not merely that somebody did something which if done by the company would be held to be a waiver, but that that person was acting under the authority of the company. And this is where he too frequently fails; not because the actor had not ample authority, but because the company denies it and the assured is unable to prove it. For the future the onus is changed, and the company must prove, not only that somebody did something which would be an election if done by the company, but that such person was acting under the authority of the company. They will not of course have much difficulty in doing so, for companies can always prove authority when they want to. But they will be deprived of their great tactical advantage by the removal of the onus as to the agent's authority from the shoulders of the assured. They must now prove authority to elect, and will not escape because the assured fails to prove authority to waive.

These three effects of the proposed change follow naturally and inevitably upon its adoption. A possible fourth is open to controversy.

Suppose that an apprenticeship agreement provides for payment by the apprentice of a present premium for five years' service and tuition, for earlier termination of the contractual relations at the election of the master, and says nothing as to return of part of the premium in that event, has the apprentice a right to demand

proportionate repayment in case his tuition ceases by exercise of the master's election at the end of a week? The authorities declare clearly enough in his favor. And suppose that a shipowner insures his fleet for three years, that he pays the premium in advance, that the contract provides that in case of war the company may elect to terminate the contract, and that nothing is said as to partial return of the premium, has not the insured a valid claim to part of it, in case of war and election to terminate at the end of the first month? And is the law otherwise if the right to elect arises upon the act of the assured rather than upon the occurrence of some public event? For example, a policy provides that the company shall have a right to terminate it if further insurance is placed upon the property, and the company exercises this right and terminates the policy before it has run a fortnight; can the company nevertheless retain the three years' premium?

Take the case a step further: Suppose that the election arises upon the doing of some act by the assured which he covenanted not to do; for example, he brought upon the premises a barrel of gunpowder in spite of his agreement to the contrary. But remember that this act had no effect other than to give to the company a right to terminate the policy, — a right which it would probably not exercise before the happening of a loss (rather it would endeavor to procure the removal of the powder), whatever it might be inclined to do afterwards.

Of course, if the apprentice declined to remain with his master and receive further instruction, he could not demand repayment of any part of the premium. And if a policy-holder had power to cancel it and did so, the company might be entitled to retain the whole amount. But the question we have in hand is whether the company may terminate its risk and yet keep the premium. It is said that

"The general rule is that if a risk never attaches under a policy, the premium is not earned, and if paid may be recovered, unless the insured has been guilty of fraud." But "if the risk attached and the policy became void subsequently, through the conduct of the insured, no part of the premium can be recovered." [1]

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[1] Ins. Co. *v.* Smith, 1899, 34 C. C. A. 506; 92 Fed. Rep. 503. And see Colby *v.* Cedar Rapids, etc., 1885, 66 Ia. 577; 24 N. W. Rep. 54; Phœnix, etc., *v.* Stevenson, 1879, 78 Ky. 161; Schrimp *v.* Cedar, etc., 1888, 124 Ill. 354; 16 N. E. Rep. 229; Farmer's, etc., *v.* Home, 1898, 54 Neb. 740; Home, etc., *v.* Kuhlman, 1899, 58 Nev. 488; Georgia, etc., *v.* Rosenfield, 1899, 37 C. C. A. 101.

That may be perfectly true. But we are discussing a case in which the policy does not become void "through the conduct of the insured," but at the election of the company. Solution of the trouble cannot, and need not, be undertaken at present. Many distinctions and analogies are involved. The French law is thus stated,[1] and it deserves consideration:

"La prime étant le prix de l'assurance, son taux devrait varier chaque année: il tombe sous le sens qu'au fur et à mesure qu'une personne vieillit ses chances de mortalité vont en augmentant. Néanmoins et à juste titre, car dans les dernières années le chiffre aurait pu être excessif, il a paru plus pratique et plus rationnel de ne pas tenir compte des différences qui se produisent d'année en année et de rendre la prime uniforme. On reporte sur les premières années une partie de ce qui serait à payer pour les dernières, en prenant la moyenne des chiffres donnés par toutes les primes prévues pour l'assurance vie entière et indiquées par les tables de mortalité. Ce chiffre de la prime uniformisée comprend deux parties: l'une correspond à la prime simple d'assurance pour l'année, l'autre est destinée à parfaire l'insuffisance des primes futures, c'est ce qui constitue la reserve.[2]

"Quand, pour une raison ou pour une autre, l'assuré arrête le contrat, l'assureur a le droit incontestable de conserver la somme représentant la prime pour chacune des années écoulées, mais il ne peut pas retenir d'une façon absolue la réserve, puisque cette réserve se rapporte à des années durant lesquelles lui, assureur, ne sera nullement engagé. Quand une personne traite pour une assurance sur la vie avec une Compagnie, cette dernière lui ouvre un compte, compte qui comprend deux éléments: la prime simple due chaque année; la somme destinée à parfaire l'insuffisance des primes futures. Si l'assuré se retire, il faut liquider cette situation: la compagnie doit rembourser le solde créditeur,[3] mais nullement quoiqu'il ait pu être soutenu,[4] dans son intégralité: pendant tout le temps qu'a duré le contrat, elle a eu à supporter des frais généraux, frais que motivait la par-

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[1] Lefort: Contrat d'assurance sur la vie, III. 18.

[2] Couteau: op. cit. T. II. 294.

[3] C'est là une différence essentielle avec l'assurance contre l'incendie: quand une police de se genre a été résilliée, l'assuré n'a rien à réclamer pour les primes par lui versées parce que les primes encaissées sont l'exacte contre-partie du risque couru. — V. Dormoy: Théorie mathém. des Assur. sur la vie, T. II. p. 79. (There is in this respect an essential difference in cases of insurance against fire: when a policy of that kind has been cancelled the assured has no claim to the premiums paid by him, because these are the exact equivalent of the risk run.)

[4] V. Laurent: Les Compagnies d'assurances sur la vie humaine. (La Réforme économique, 1875): de Serbonnes: des contrats discontinués (Monit. des assur. 1875, p. 429); Cook: La valeur de rachat (*Ibid.* 1877, p. 87). *Cf.* Dormoy: op. cit. p. 79; Karup: Theoretisches Handbuch des Lebens versicherung, T. III. p. 135.

ticipation de l'assuré, et dont il ne saurait s'exonérer en excipant de son départ, la compagnie n'étant pas un mandataire chargé de faire gratuitement les affaires de leur clientèle.[1]" [2]

Before closing let an objection to the main argument of this article be answered. Suppose that a breach of the policy takes place during its currency, but that the company does not hear of it until after the loss, would not the conventional defense be a good one, namely (1) the condition, and (2) the breach? For example, suppose that the condition forbade gunpowder on the premises, that the gunpowder was brought there, that its presence was successfully concealed from the company until after the loss; in such a case how is the company going to defend itself upon the plea of election? It could not elect because it knew nothing of the breach. For answer let it be said that whatever our difficulties we must not alter the contract. The policy says that breach of any condition "renders this policy void at the election of the company"; it cannot become void unless the company so elects; and there-

[1] De Courcy: Précis de l'assurance sur la vie, p. 289. Ce prélèvement est destiné à couvrir les dépenses générales de l'entreprise et à procurer un bénéfice suffisamment rémunérateur aux capitaux qui y sont engagés. *Conf.:* Des entreprises d'assurances sur la vie (L'Opinion, Avril, 1870, p. 55). (This assessment is destined to cover the general expenses of the enterprise, and to procure a sufficiently remunerative return upon the capital engaged in it.)

[2] "The premium being the price of the insurance, its amount must vary each year: for the reason that in the measure that a person grows old his chances of death are increased. Nevertheless, and rightly so, for in the last years the figure would be excessive, it appears to be more practical and more rational not to take into account the differences which are produced from year to year and to render the premium uniform. We carry back the part of that which is paid in the last years to the first year, and take the mean of the figures given by all the premiums provided for the entire life insured and indicated by the tables of mortality. The amount of the premium thus made uniform comprises two parts: the one corresponds to the simple premium of insurance for the year; the other is destined to equalize the insufficiency of the future premiums. It is this which constitutes the reserve. When for one reason or another the assured puts an end to the contract, the insurer has the incontestable right to keep the sum representing the premium for each of the years already past, but he cannot retain in absolute fashion the reserve, since this reserve has relation to the years during which the assurer will not be under obligation. When a person agrees for a life insurance with a company, the company opens with him an account which comprises two elements: the simple premium due each year; the sum destined to equalize the insufficiency of the future premiums. If the assured withdraws, it is necessary to liquidate this situation: the company ought to reimburse the amount at the credit of the account; but not in its entirety, although it might have been exhausted (by liabilities of the company?). During all the time that the contract was in force the company had to pay its general charges which induced the participation of the assured and from which he cannot exonerate himself by indicating his departure, the company not being a mandatory charged with transacting gratuitously the affairs of their customers."

fore the company must succeed upon the ground of election or not at all.

And the company is not in any difficulty. Election to terminate may be made within a reasonable time after knowledge of the facts. "Yes," you say, "but how will it help the company to terminate the contract after the loss has happened?" To which I reply: The fact of loss cannot take away or affect the right of election given by the contract. There are scores of cases in which the breach itself occurs after the loss (*e. g.* failure to furnish proofs). Moreover, it must not be imagined that termination of the contract dates from the time of election. It dates from the breach. Look at the contract. It says that a certain act shall void the policy, — if the company so says. The company does so say. Say what? That the *act* voids the policy. When did the act void the policy? At the only time it could do so, namely, when it occurred. Observe that whether the act has voided the policy is a matter for the company's election. What the company elects is that a certain act shall or shall not have a certain effect, or, in other words, that the language of the contract shall or shall not have its operative effect. The company does not change the contract. It says: We elect that the voidance clause shall operate.[1]

Some time ago I commenced the compilation of a treatise on "waiver." The subject has, however, proved to be of most illusive character. In insurance law, in landlord and tenant, and in other important departments in which waiver has been commonly supposed to have extensive operation, it has steadily receded before close analysis. The book may change its title before it is published.

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[1] Election to abandon a wreck to the company in which it is insured "is retrospective, operating from the moment of the casualty." Arnould, Marine Ins., 1901, § 1205.